COMMENTS

HARMLESS ERROR AND AEDPA: *BRECHT*'S APPLICABILITY AFTER *FRY*

I. INTRODUCTION

Built into the United States Constitution is "[t]he Privilege of the Writ of Habeas Corpus,"[1] a mechanism whereby a prisoner may challenge his conviction in federal court "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[2] Following direct review of a prisoner's claim, a federal court may exercise its habeas corpus power on collateral review,[3] offering the prisoner a final chance to appeal the constitutionality of his conviction.[4] The importance of maintaining this constitutional safeguard against wrongful conviction cannot be contested, although over recent years, concern for abuses of the writ has motivated both Congress and the courts to implement measures designed to curb such perceived exploitation.[5]

1. U.S. CONST. art. I, § 9, cl. 2.

2. 28 U.S.C. § 2254(a) (2000). This Comment focuses primarily on habeas corpus in the context of state prisoners and constitutional challenges.

3. As the phrase is used throughout this Comment, direct review refers to the appellate process whereby a person may challenge his conviction through the state system and through writ of certiorari to the U.S. Supreme Court. *See* YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 19-20 (11th ed. 2005) (describing appellate procedure following criminal conviction). Collateral review refers to the process whereby a convict has exhausted his appeals and is seeking "postconviction remedies" to challenge his conviction in the form of the writ of habeas corpus. *See id.* at 20 (giving brief background on collateral review); Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, CHAMPION, June 2005, at 16, 16 (differentiating between "direct appeal process" and habeas corpus).

4. *See generally* John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271 (1996) (providing concise, yet effective, discussion of habeas corpus procedure).

5. *See* David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 825-28 (1994) (discussing abuse of writ concept and case law). Professor Chemerinsky describes the "great disagreement over the circumstances under which habeas corpus should be available," delineating two general views: (1) those in favor of maintaining the potency of the writ "as an essential protection" against constitutional abuse, and (2) those who see habeas "as the vehicle that guilty people use to escape convictions and sentences." Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 749-50 (1987). Indeed, as gathered from majority and dissenting views in Supreme Court cases involving federal habeas law, there is sharp divergence in opinion concerning the appropriate policies driving federal habeas review. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 758 (1991) (Blackmun, J., dissenting) (arguing that majority's reliance on federalism and comity failed to account for defendant's "right to a criminal proceeding free from constitutional defect"). For a discussion of several Supreme

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA" or "the Act"),[6] which put in place statutory amendments to habeas corpus law and procedure.[7] AEDPA created waves in the legal community for its seemingly harsh restrictions on a prisoner's ability to obtain federal habeas relief.[8] Amidst AEDPA's effects on habeas law, a conflict emerged regarding the federal courts' role in reviewing whether an alleged constitutional error was harmless, thus requiring denial of relief.[9] Prior to AEDPA, *Brecht v. Abrahamson*[10] required federal habeas courts to analyze a constitutional error for harmlessness in terms of whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'"[11] Since the passage of § 2254(d)(1) of the Act, however, a federal habeas court may not grant relief unless the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law."[12] When a federal court reviews the state court's determination of harmless error, it is confronted with these two seemingly conflicting standards. Such a predicament created a split amongst the circuits.[13]

This Comment takes up the issue of whether § 2254(d)(1) of AEDPA has displaced *Brecht* as the correct standard under which federal courts should review harmless error in a habeas corpus petition. Recently, the Supreme Court largely put to rest any contention that *Brecht* has failed to survive AEDPA's passage by holding that *Brecht* applies on federal habeas review regardless of whether a state court performs a harmless error analysis.[14] In line with the latest decision, this Comment argues that *Brecht* has survived AEDPA but further elaborates on how a federal court should actually entertain harmless error review, an analysis that the Court has not yet fully outlined. A revised two-step approach to federal habeas harmless error analysis, based on the test employed by the Fourth, Seventh, Ninth, and Tenth Circuits, is best suited to efficiently integrate both the § 2254(d)(1) standard and *Brecht*.

Part II of this Comment outlines the major advances in harmless error doctrine and federal habeas law relevant to examining the interplay between AEDPA and federal habeas harmless error review. First, Part II provides a brief historical backdrop of harmless error, tracing the early courts' reluctance to

Court restrictions on habeas corpus prior to its harmless error limitation, see *infra* notes 67-69 and accompanying text.

6. 28 U.S.C.A. §§ 2244, 2253-2255, 2261-2266 (West 2006).

7. For a discussion of AEDPA's statutory framework, see *infra* Part II.C.1.

8. See *infra* notes 101-05 and accompanying text explaining uncertainty and debate among various courts and commentators following AEDPA.

9. For a discussion of the harmless error doctrine, see *infra* Parts II.A-B.

10. 507 U.S. 619 (1993).

11. *Brecht*, 507 U.S. at 627 (quoting Brecht v. Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991)). See *infra* Part II.B for commentary on *Brecht*.

12. 28 U.S.C. § 2254(d)(1) (2000). For the full statutory language of § 2254(d)(1), see *infra* note 100 and accompanying text.

13. For a discussion of the circuit split, see *infra* Part II.D.2.

14. Fry v. Pliler, 127 S. Ct. 2321, 2328 (2007). For a background on *Fry*, see *infra* Part II.D.1.

apply the doctrine to the current practice of reviewing constitutional errors for harmlessness.[15] Next, the focus turns to harmless error as it pertains to federal habeas corpus, examining *Brecht* and its impact on federal courts' role in analyzing for harmlessness on habeas review.[16] Then, AEDPA is examined, narrowing in on § 2254(d)(1), the provision that caused debate among the circuits as to the requisite standard for harmless error review.[17] Finally, Part II concludes with a synopsis of recent Supreme Court jurisprudence valuable to resolving the conflict between § 2254(d)(1) and *Brecht*[18] as well as a discussion of the federal courts' differing approaches in handling harmless error review.[19]

In Part III, this Comment discusses *Brecht*'s vitality in post-AEDPA federal habeas corpus law. The argument is comprised of three main assertions. First, the Supreme Court has issued several recent opinions that indicate *Brecht* has survived § 2254(d)(1).[20] Second, based on Supreme Court guidance, the two-step test applied by several circuits in tackling harmless error on habeas review is best suited to efficiently integrate § 2254(d)(1) with the *Brecht* standard; nevertheless, the test must be refined in order to comply with Supreme Court jurisprudence.[21] Finally, the closely linked rationale behind *Brecht* and AEDPA reveal that both standards merely complement one another rather than create conflict.[22]

II. OVERVIEW

A. Background on Harmless Error

The evolution of harmless error[23] has been treated extensively by many commentators throughout the doctrine's journey to its present state.[24] As

15. See *infra* Part II.A for a discussion of early harmless error underpinnings, including *Kotteakos v. United States*, 328 U.S. 750 (1946), and the seminal case of *Chapman v. California*, 386 U.S. 18 (1967).

16. See *infra* Part II.B for an explanation of *Brecht*'s introduction of the *Kotteakos* standard to federal habeas corpus harmless error review.

17. See *infra* Part II.C for a brief overview of AEDPA's changes to federal habeas corpus review, a discussion of § 2254(d), and the Supreme Court's interpretation of the provision in *Williams v. Taylor*, 529 U.S. 362 (2000).

18. See *infra* Part II.D.1 for a discussion of relevant Supreme Court law.

19. See *infra* Part II.D.2 for a review of the circuit split.

20. See *infra* Part III.A for a discussion of the Supreme Court case law indicating *Brecht*'s vitality.

21. See *infra* Part III.B for a description of the refined two-step test federal habeas courts should apply to harmless error review.

22. See *infra* Part III.C for a discussion of the rationale of AEDPA and *Brecht*.

23. Put in basic terms, the phrase "harmless error" has been described as the notion requiring a reviewing court to disregard any lower court error that "does not affect a substantial right of the party complaining of the error." 19 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 206.07, at 206-36 (3d ed. 2007). If the reviewing court has deemed an error to be harmless, this determination translates to the assertion that the verdict should not be discarded since such "insignificant error[] . . . did not influence the outcome of the trial and . . . if corrected, likely would not change the result of a new trial." *Id.*

24. *E.g.*, Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme*

discussed below, upon establishment in the American legal system, the Supreme Court over time shifted the doctrine from its initial confinement within the nonconstitutional arena to ultimately allowing constitutional errors to be deemed harmless per *Chapman v. California*.[25]

1. Nonconstitutional Harmless Error

Prior to 1919, early American appellate courts did not consider whether an error committed in the trial court was "harmless."[26] Rather, there was a practice of reversing decisions for any error in the lower court, regardless of how trivial.[27] As noted by Justice Rutledge, this practice left the appellate courts to "'tower above the trials of criminal cases as impregnable citadels of technicality.'"[28] In short, by requiring reversal for any error, judicial resources were being wasted, fairness was questionable as parties escaped judgments based on technicalities, and there was potential for judges to alter the substantive and procedural law to avoid errors and thus reversal.[29]

In February of 1919, Congress enacted the "harmless error statute,"[30] which was aimed at ending the previous system of reversal for trivial errors at trial.[31] Today, 28 U.S.C. § 2111,[32] along with both the Federal Rules of Civil Procedure[33] and the Federal Rules of Criminal Procedure,[34] contain rules similar

Court's Harmless Constitutional Error Doctrine, 50 U. KAN. L. REV. 309, 339-44 (2002) (arguing that "effect-on-the-jury" standard is preferable to "overwhelming evidence" standard when conducting harmless error analysis); James S. Liebman & Randy Hertz, Brecht v. Abrahamson*: Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109, 1135-56 (1994) (examining harmless error test after *Brecht*); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2408-16 (1993) (criticizing Supreme Court cases that undermine habeas jurisdiction through application of harmless error doctrine); Robin A. Colombo, Note, Brecht v. Abrahamson*: Hard Justice for State Prisoners?*, 35 B.C. L. REV. 1103, 1134-44 (1994) (challenging commentators' strong criticisms of *Brecht* decision). For expansive treatment on the harmless error doctrine, see 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 31.1-.5 (5th ed. 2005).

25. 386 U.S. 18, 22 (1967).

26. Cooper, *supra* note 24, at 314 (discussing early stages of harmless error development).

27. *Id.*

28. Kotteakos v. United States, 328 U.S. 750, 759 (1946) (citing Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)).

29. Cooper, *supra* note 24, at 314.

30. *Kotteakos*, 328 U.S. at 757-60 (elaborating on history, language, and rationale of statute). The predecessor to today's harmless error statute stated in part: "'[T]he court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'" *Id.* at 757 (quoting 28 U.S.C. § 391 (1946) (repealed 1948) (current version at 28 U.S.C. § 2111 (2000))).

31. Joshua A.T. Fairfield, *To Err Is Human: The Judicial Conundrum of Curing* Apprendi *Error*, 55 BAYLOR L. REV. 889, 894-95 (2003) (stating that 1919 statute instructed courts to ignore errors that did not affect substantial rights).

32. 28 U.S.C. § 2111 (2000). The Code states: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *Id.*

33. FED. R. CIV. P. 61 (stating in part that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the

to the original harmless error statute.[35]

The Supreme Court initially restricted the harmless error doctrine to nonconstitutional errors.[36] The Court's first major elaboration on the doctrine was in 1946.[37] In *Kotteakos v. United States*,[38] the government erroneously charged the defendants with a single conspiracy despite the fact that the defendants were involved in separate fraudulent behavior.[39] In rejecting the government's argument that such error was harmless, the Court stated that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather . . . whether the error itself had substantial influence."[40] The Court ultimately found that it was "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."[41]

2. Constitutional Harmless Error and the *Chapman* Standard

Despite the Court's initial confinement of harmless error analysis to nonconstitutional violations,[42] the seminal case of *Chapman v. California*[43] expanded the doctrine in 1967 to allow for harmless error review of constitutional abuses.[44] *Chapman* involved the conviction of two defendants for, among other charges, murdering a bartender.[45] Although neither defendant chose to testify, the California state constitution allowed the prosecution to use

parties").

34. FED. R. CRIM. P. 52(a) (stating that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded").

35. Some commentators describe the early wariness of expanding harmless error analysis to criminal cases and constitutional cases as well. *See, e.g.*, David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483, 486-87 (quoting Professors Wright and Miller and noting other court and commentator viewpoints that harmless error may be dangerous in criminal arena). Criminal cases, in contrast to civil cases, implicate a loss of liberty which has always required the utmost protection against abuse. *Id.* In *Kotteakos*, the Court seemed to agree with such concern by elaborating that despite there being no explicit instruction on how to treat civil cases differently than criminal cases, the harmless error statute should not be read in criminal cases as making "irrelevant the fact that a person is on trial for his life or his liberty." 328 U.S. at 762-63.

36. Dow & Rytting, *supra* note 35, at 487. For a discussion of "statutory" harmless error, see Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast That Swallowed the Constitution*, 25 T. MARSHALL L. REV. 45, 57-60 (1999-2000).

37. *See* Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 522-30 (1998) (giving history of harmless error and critiquing Supreme Court decisions).

38. 328 U.S. 750 (1946).

39. *Kotteakos*, 328 U.S. at 752-55.

40. *Id.* at 765.

41. *Id.* at 776.

42. Justice Rutledge stated for the *Kotteakos* majority that if the error is trivial, the judgment should not be altered unless the error is a constitutional issue, such as coerced confessions, in which case a reversal is allowable despite other sufficient evidence for guilt. *Id.* at 764-65.

43. 386 U.S. 18 (1967).

44. For a critique of the harm caused by *Chapman*'s expansion of harmless error to constitutional errors, see Dow & Rytting, *supra* note 35, at 487-90.

45. *Chapman*, 386 U.S. at 18-19.

the defendants' silence as incriminating evidence at trial, which it did.[46] After conviction, but before review by the California Supreme Court, the U.S. Supreme Court ruled in a separate case[47] that California's constitutional provision violated the Fifth Amendment to the U.S. Constitution.[48] The California Supreme Court, in recognizing a constitutional violation at the trial level, deemed the error harmless and affirmed the judgment.[49]

On direct appeal, the U.S. Supreme Court elucidated a standard for appellate courts to apply in harmless error analysis.[50] In ruling that the error in this case was not harmless, the Court stated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[51] *Chapman* refused to recognize that all trial errors of a constitutional nature required automatic reversal but did acknowledge that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error."[52] Although it is somewhat questionable as to whether the Court had the power to impose such a sweeping standard on state courts,[53] the *Chapman* "harmless beyond a reasonable doubt" test[54] continues to bind state and federal appellate courts engaging in direct review of constitutional error.[55]

46. *Id.* at 19. The trial court, in charging the jury, stated that "adverse inferences" could be drawn due to the defendants' failure to testify. *Id.*

47. Griffin v. California, 380 U.S. 609 (1965).

48. *Chapman*, 386 U.S. at 19-20.

49. *Id.* at 20.

50. *Id.* at 24.

51. *Id.*

52. *Id.* at 23. For a summary of current per se violations not subject to harmless error analysis, see 2 HERTZ & LIEBMAN, *supra* note 24, § 31.3.

53. *Compare* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 1-5 (1994) (concluding that *Chapman*'s authority rests on constitutional common law), *with* Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 MICH. ST. L. REV. 541, 591-96 (questioning source of *Chapman*'s power and addressing Meltzer's argument that it comes from constitutional common law).

54. *Chapman*, 386 U.S. at 24.

55. *See, e.g.*, Neder v. United States, 527 U.S. 1, 4 (1999) (concluding that *Chapman* harmless error analysis applies to error committed in federal criminal trial). Following *Chapman*, complications began to permeate the Court's harmless error jurisprudence, beginning with *Harrington v. California*, 395 U.S. 250 (1969). *See* Cooper, *supra* note 24, at 319-20 (stating *Chapman*'s unclear holding was further compounded by its progeny). The Court, in affirming *Chapman*, ruled that a constitutional violation of the defendant's right to confrontation was harmless because there was "overwhelming" evidence to support the defendant's conviction. *Harrington*, 395 U.S. at 254. In a dissent, Justice Brennan claimed that the majority not only misapplied *Chapman*, but had overruled it by "shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction." *Id.* at 255 (Brennan, J., dissenting). *Arizona v. Fulminante*, 499 U.S. 279 (1991), in holding that the *Chapman* harmless error analysis applied to all constitutional violations at trial, is considered by some to be the pinnacle of harmless error expansion. *E.g.*, Colombo, *supra* note 24, at 1112 (referencing argument that *Fulminante* is largest expansion of harmless error). Some scholars argue that although *Fulminante* theoretically divides errors into "structural" and "trial," nearly all constitutional violations are regarded as "trial"

B. Brecht *Harmless Error in Federal Habeas Corpus*

Professor Martha Davis stated that "[t]he most dramatic broadening of harmless error application has been in habeas cases."[56] Indeed, *Brecht v. Abrahamson*[57] created a new deferential standard for federal courts to apply on habeas review, distinctly different than the standard for courts conducting direct review.[58] Prior to *Brecht*, the Supreme Court adhered to the *Chapman* standard in reviewing state trial court errors in habeas corpus cases,[59] as did lower federal courts.[60] Yet, *Brecht*'s change to the harmless error standard in habeas corpus review seems a natural progression given the Court's jurisprudence leading up to the decision, which seemed to be steadily eroding the scope of federal habeas power.[61]

Beginning in 1953, the Court sanctioned a brief period of immense federal habeas corpus expansion.[62] In *Brown v. Allen*[63] and *Fay v. Noia*,[64] the Court extended habeas power to allow federal courts to hear habeas petitions of state prisoners[65] even if procedural default existed during the state proceedings.[66]

errors and subject to harmless error review. *See, e.g.*, Bennett L. Gershman, *The Gate Is Open but the Door is Locked—Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115, 132 (1994) (asserting *Fulminante* allows almost all constitutional errors to be analyzed for harmlessness). As summarized by Professor Jeffrey Cooper, *Fulminante* is crucial in that it not only distinguished between "structural" and "trial" errors, but it also disregarded *Chapman*'s (and *Kotteakos*'s) indication that a coerced confession is not subject to harmless error review. Cooper, *supra* note 24, at 321-22.

56. Davis, *supra* note 36, at 83.

57. 507 U.S. 619 (1993).

58. *Brecht*, 507 U.S. at 637. In the words of Chief Justice Rehnquist, "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Id.* This new standard has been met with criticism. *See, e.g.*, Liebman & Hertz, *supra* note 24, at 1111-12 (noting difficulty in understanding *Brecht*'s need for departure from 200 years of parity between direct appeal and habeas corpus scope and standards).

59. *E.g.*, Yates v. Evatt, 500 U.S. 391, 407-11 (1991) (applying *Chapman* "harmless beyond a reasonable doubt" standard), *abrogated by* Estelle v. McGuire, 502 U.S. 62 (1991); Rose v. Clark, 478 U.S. 570, 579-84 (1986) (same); Milton v. Wainwright, 407 U.S. 371, 372-78 (1972) (same).

60. *E.g.*, Lesko v. Lehman, 925 F.2d 1527, 1546-47 (3d Cir. 1991) (applying *Chapman* "harmless beyond a reasonable doubt" standard); Coleman v. McCormick, 874 F.2d 1280, 1289 (9th Cir. 1989) (same); Sawyer v. Butler, 848 F.2d 582, 593-95 (5th Cir. 1988) (same); Kampshoff v. Smith, 698 F.2d 581, 587-89 (2d Cir. 1983) (same).

61. For example, in *Coleman v. Thompson*, 501 U.S. 722 (1991), *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Stone v. Powell*, 428 U.S. 465 (1976), the Court chipped away at federal habeas power in each case. See *infra* notes 67-68 and accompanying text for a discussion of the restrictions placed on habeas corpus by these cases.

62. *See* Colombo, *supra* note 24, at 1114-19 (giving overview of Supreme Court expansion and limitation of federal habeas law).

63. 344 U.S. 443 (1953).

64. 372 U.S. 391 (1963), *overruled by Wainwright*, 433 U.S. 72.

65. *Brown*, 344 U.S. at 485-87.

66. *Fay*, 372 U.S. at 399 (stating that prisoner's failure to appeal in state system did not foreclose federal review).

With its decision in *Stone v. Powell*,[67] however, the Court ushered in an era defined by steady restriction on federal habeas power.[68] In a growing jurisprudence, finality, comity, and federalism interests guided the Court to impose tighter boundaries on federal habeas.[69] In 1993, *Brecht* added a new limitation on federal habeas power by "squarely address[ing] . . . the applicability of the *Chapman* standard on habeas."[70]

In *Brecht*, the defendant was convicted of first-degree murder.[71] On appeal, he claimed his constitutional due process rights were violated when the prosecution referenced his post-*Miranda* silence.[72] The Wisconsin Supreme Court upheld the conviction under *Chapman*, concluding that the constitutional violation was harmless beyond a reasonable doubt.[73] On habeas review, the federal district court disagreed with the state court's determination of harmlessness under *Chapman* and found that, because the evidence of the defendant's guilt was not "overwhelming," the conviction should be set aside.[74] The U.S. Court of Appeals for the Seventh Circuit reversed the district court, applying not the *Chapman* standard but rather the standard articulated in *Kotteakos*.[75] The court held that, based on the permissible post-*Miranda* references to the defendant's silence, the due process violation did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'"[76] In a five to four decision, the U.S. Supreme Court affirmed, holding that *Kotteakos*, not *Chapman*, set forth the correct standard for federal habeas corpus review of trial court harmless error.[77]

67. 428 U.S. 465 (1976).

68. *See* Colombo, *supra* note 24, at 1116 (describing cases that restrained habeas power). In *Powell*, the Court held that so long as the state "provided an opportunity for full and fair litigation," habeas relief was unavailable for a prisoner's Fourth Amendment claim. 428 U.S. at 494. Further limitations began to surface as well. For example, in *Wainwright v. Sykes*, the Court refined *Fay*'s liberal allowance of habeas relief despite procedural default by permitting a federal court to grant habeas only if the petitioner could show "cause" and "prejudice" due to the default. *Wainwright*, 433 U.S. at 90-91. Eventually *Fay* was completely discarded by *Coleman v. Thompson*, which denied habeas relief if the state court decision rested on "independent" and "adequate" state procedural default. 501 U.S. 722, 729-32 (1991). As stated succinctly by one scholar, *Brown* and *Fay* were grounded in the need "to preserve litigants' full opportunity for plenary judicial review," rejecting "absolute deference to state judgments," whereas the recent trend in habeas law of "carv[ing] out exceptions to full plenary review . . . . relie[s] on principles of finality and federalism." Colombo, *supra* note 24, at 1119.

69. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion) (recognizing that in determining proper scope of habeas review, interests of comity and finality must be considered).

70. Brecht v. Abrahamson, 507 U.S. 619, 631 (1993).

71. *Id.* at 624-25.

72. *Id.* at 626.

73. *Id.*

74. *Id.*

75. Brecht v. Abrahamson, 944 F.2d 1363, 1375-76 (7th Cir. 1991), *aff'd*, 507 U.S. 619, 639 (1993). For a discussion of *Kotteakos*, see *supra* notes 37-41 and accompanying text.

76. *Id.* at 1375 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

77. *Brecht*, 507 U.S. at 638.

The rationale underlying the Court's shift from *Chapman* to *Kotteakos* for habeas corpus is similar to its support for its previous limitations on habeas doctrine.[78] Chief Justice Rehnquist, writing for four other Justices, addressed concerns for finality, comity, and federalism, stating that "'[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'"[79] In disregarding the need for federal courts to apply "the identical approach . . . that *Chapman* requires state courts to engage in on direct review,"[80] the Chief Justice maintained that *Kotteakos* is better aligned with recent habeas law affording proper deference to state court decisions.[81]

Many commentators have expressed critique and concern over *Brecht*'s alteration of harmless error in the habeas context.[82] Issues that arose after *Brecht* include the degree of certainty required for courts applying the *Kotteakos* standard, whether the test should focus on the existence of a "substantial and injurious effect" on the jury that heard the case or a hypothetical jury, and what context-specific factors are relevant in this inquiry.[83] For the scope of this Comment, it is important to clarify that despite *Brecht*'s complications the Supreme Court did not disregard the *Chapman* standard, which still applies to cases on direct review.[84] Rather, *Brecht* ruled that in a federal habeas corpus case, the court must determine whether a constitutional error "had [a] substantial and injurious effect or influence in determining the jury's verdict."[85]

Prior to recent case law, there was a debate amongst the circuits whether a federal habeas court should apply *Brecht* if, in fact, the state court did not apply *Chapman* on direct review.[86] As noted above, in *Brecht*, the state court had

78. See *supra* notes 67-69 and accompanying text for a brief discussion of certain limitations.

79. *Brecht*, 507 U.S. at 635 (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).

80. *Id.* at 636.

81. *Id.* at 637-38.

82. *See*, *e.g.*, J. Thomas Sullivan, *The "Burden" of Proof in Federal Habeas Litigation*, 26 U. MEM. L. REV. 205, 218-27 (1995) (detailing new role that prejudice plays in harmless error analysis and expressing concern over its application); Yackle, *supra* note 24, at 2409-15 (arguing that *Brecht* has diluted standard for constitutional violations and will lead to denial of federal habeas relief for prisoners). For a detailed treatment of *Brecht*, see 2 HERTZ & LIEBMAN, *supra* note 24, §§ 31.4-.5.

83. 2 HERTZ & LIEBMAN, *supra* note 24, § 31.4, at 1532.

84. *Brecht*, 507 U.S. at 636. Commentators have expressed concern that *Brecht* may indicate a coming switch from *Chapman* to *Kotteakos* on direct review as well. 2 HERTZ & LIEBMAN, *supra* note 24, § 31.1, at 1509. The concern stems from the *Brecht* Court's use of 28 U.S.C. § 2111 to promote the *Kotteakos* standard. *Id.* at § 31.1, at 1509 n.23. The Court stated that the statute does not differentiate between direct and collateral review. *Brecht*, 507 U.S. at 631-32. *Brecht* apparently made the statute authoritative on constitutional error, which *Chapman* had refused to do; this decision could lead to application of *Kotteakos* in place of *Chapman*. 2 HERTZ & LIEBMAN, *supra* note 24, § 31.1, at 1509 n.23. For the wording of § 2111, see *supra* note 32.

85. *Brecht*, 507 U.S. at 637-38 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

86. *Compare* Middleton v. Roper, 455 F.3d 838, 857 (8th Cir. 2006) (applying *Chapman* rather than *Brecht* on habeas review if state court was "unclear" about applying or did not apply *Chapman* on direct review), *with* Bains v. Cambra, 204 F.3d 964, 976-77 (9th Cir. 2000) (aligning with majority of circuits by finding *Brecht* to apply to federal habeas review regardless of whether state court conducts *Chapman*—or any—harmless error review). The Eighth Circuit specifically had maintained that

already engaged in *Chapman* harmless error analysis.[87] In *Fry v. Pliler*,[88] the Supreme Court held that *Brecht* is the applicable standard regardless of whether the state court performed a *Chapman* review, resolving any lingering dispute over *Brecht*'s blanket applicability on federal habeas review.[89]

C. Federal Habeas Review Power in Light of AEDPA and § 2254(d)(1)

Three years after *Brecht* was decided, Congress passed the controversial AEDPA.[90] AEDPA made a number of statutory changes to federal habeas corpus law.[91] The following section elaborates on these changes, particularly focusing on § 2254(d)(1)[92] and the Supreme Court's interpretation of that provision in *Williams v. Taylor*.[93]

1. Statutory Changes of AEDPA

Congress enacted AEDPA in response to concern over abuses involving the writ of habeas corpus generally as well as the specific "'problems of unnecessary

Brecht was limited to the facts of that case, that is, where *Chapman* has already been applied on direct review. *E.g.*, Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993) (limiting *Brecht* to where *Chapman* was applied on direct appeal). The *Brecht* Court's concern over disrupting finality by repeating an identical harmless error analysis, so the argument went, was not an issue when the more stringent *Chapman* standard had not yet been applied. *See, e.g.*, *id.* (distinguishing *Brecht* rule because state court did not review error at all whereas in *Brecht*, error had been reviewed under *Chapman* standard). The Second Circuit was undecided on the issue. *See, e.g.*, Carracedo v. Artuz, 81 F. App'x 741, 744-45 & n.3 (2d Cir. 2003) (avoiding decision of whether *Brecht* applies without previous *Chapman* analysis). Nevertheless, most circuits did apply *Brecht* irrespective of whether the court on direct review applied *Chapman*. *See, e.g.*, *Bains*, 204 F.3d at 976-77 (discussing other circuits' views). The reasoning behind the majority view stemmed in part from the fact that many times, state courts on direct review do not recognize constitutional error at all, and thus *Brecht* would be applicable only in a sliver of cases. *Id.* at 977. In addition, the interests *Brecht* attempted to preserve (i.e., finality, comity, and federalism) are violated on federal court reversal regardless of whether the state court's error was its failure to review for constitutional error or its application of the wrong standard. *Id.*

87. *Brecht*, 507 U.S. at 626.

88. 127 S. Ct. 2321 (2007). For an overview of the *Fry* case, see *infra* notes 161-70 and accompanying text.

89. *See Fry*, 127 S. Ct. at 2327 (finding *Brecht* to be correct standard for harmless error review).

90. 28 U.S.C.A. §§ 2244, 2253-2255, 2261-2266 (West 2006). Similar to harmless error doctrine, scholars have amassed volumes describing the waves caused by AEDPA. *See, e.g.*, Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 387 (1997) (asserting that AEDPA compromises federal government's Bill of Rights enforcement ability through power transfer to states); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 924-25 (2001) (describing how, under AEDPA, defendants cleared by previously unavailable DNA evidence must bank on state "goodwill" to free them). For a thorough and thoughtful discussion of AEDPA, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

91. See *infra* notes 96-97 and accompanying text for a brief discussion of several AEDPA provisions which have affected habeas law.

92. 28 U.S.C. § 2254(d)(1) (2000). See *infra* notes 98-131 and accompanying text for a discussion of § 2254(d)(1).

93. 529 U.S. 362 (2000). See *infra* Part II.C.2 for a discussion of the *Williams* decision.

delay and abuse in capital cases.'"[94] Signed by President Clinton, the Act adopted many of the suggestions of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, an organization formed by Chief Justice Rehnquist and headed by retired Justice Powell (termed the "Powell Committee").[95] AEDPA amended the existing habeas process in several significant ways under Chapter 153 of the Judicial Code[96] but also added an entirely new, streamlined procedure for capital cases under Chapter 154, which is triggered when the involved state has satisfied certain requirements imposed by statute.[97]

Perhaps the most controversial provision in AEDPA (which many consider to be its centerpiece),[98] and that which is most crucial in determining the effect on *Brecht*, is § 2254(d)(1).[99] The text of the provision reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an

94. 1 HERTZ & LIEBMAN, *supra* note 24, § 3.2, at 112 (quoting H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.)).

95. Marianne L. Bell, Note, *The Option Not Taken: A Progressive Report on Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act*, 9 CORNELL J.L. & PUB. POL'Y 607, 609-17 (2000) (discussing background and adoption of "Powell Committee" report).

96. *See, e.g.*, 1 HERTZ & LIEBMAN, *supra* note 24, § 3.2 (detailing changes made to Chapter 153); John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 270-71 (2006) (giving overview of Chapter 153); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 25-47 (1997) (describing and predicting effects of AEDPA). Briefly, a one-year statute of limitations period is now imposed on the petitioner for filing the writ, whereas previously, no limitations period existed. 28 U.S.C. § 2244(d); *see also* Blume, *supra*, at 270 (describing lack of limitations period prior to adoption of AEDPA). Additionally, the exhaustion doctrine was revised, allowing the federal court to deny a petition on the merits should it determine that the petition contains an unexhausted claim while also requiring that, should the state waive the exhaustion requirement, it must be expressly done. 28 U.S.C. § 2254(b)(2)-(3). A petitioner's ability to file successive petitions was refined in a number of ways. A court of appeals panel now performs a gatekeeping function of granting or denying a petitioner's successive filing and has a limited time to act. *Id.* § 2244(b)(3); *see also* Tushnet & Yackle, *supra*, at 32-34 (discussing procedure set forth in § 2244(b)(3)). Any claim previously raised in a successive filing must be dismissed. 28 U.S.C. § 2244(b)(1). If the claim was not previously raised, in order to avoid dismissal, the petitioner must show that a new retroactive rule applies to his case or that, due to newly discovered facts, he would be found innocent by a reasonable factfinder. *Id.* § 2244(b)(2). The Act also altered the appeals process by requiring a "certificate of appealability." *Id.* § 2253(c).

97. 28 U.S.C.A. §§ 2261-2266 (West 2006). Essentially, for a state to qualify for the accelerated process, it must have "a mechanism for the appointment . . . of competent counsel in State postconviction proceedings brought by indigent prisoners" along with "standards of competency for the appointment of [such] counsel." *Id.* § 2265(a)(1). For additional discussion of Chapter 154 and states' inability to meet these "opt-in" requirements, see 1 HERTZ & LIEBMAN, *supra* note 24, § 3.3; Blume, *supra* note 96, at 271-72; and Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603, 646-50 (1998).

98. Blume, *supra* note 96, at 272-73.

99. 28 U.S.C. § 2254(d)(1) (2000).

> unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .[100]

Following the passage of AEDPA, § 2254(d)(1)'s statutory language generated concern about the potential created by the provision to strip federal courts of their power to independently review a habeas claim.[101] Large-scale questions loomed pertaining to the meaning of the phrases "contrary to" and "unreasonable application."[102] Also unknown was the definition of "clearly established" federal law.[103] Of perhaps greatest importance was whether the language added up to a congressional intent for federal courts to, in essence, "defer" to state court decisions involving federal law, which would have critical constitutional implications.[104]

2. Supreme Court Guidance on the § 2254(d)(1) Standard in *Williams*

Initially, lower federal courts were left without direction when it came to applying the section's ambiguous language, and, as a result, circuits created varying interpretations of what the provision required.[105] Four years after the statute's introduction, the Supreme Court attempted to clarify § 2254(d)(1) in *Williams v. Taylor*.[106] Although spoken in a somewhat splintered voice,[107] the Supreme Court addressed many of the issues that arose from the largely untested provision.

In *Williams*, the petitioner filed for habeas relief in federal district court, claiming that he had inadequate counsel in violation of his constitutional right[108] set forth by the Supreme Court decision, *Strickland v. Washington*.[109] As the

100. *Id.*

101. *See, e.g.*, 1 HERTZ & LIEBMAN, *supra* note 24, § 3.2, at 127 n.39 (noting Supreme Court reluctance to require federal court "deference" to state court decisions, thereby preserving federal court independence, contrary to view of some circuits); Blume, *supra* note 96, at 274 (stating that AEDPA did not have wide-reaching effects many predicted).

102. *See, e.g.*, Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 555-71 (1999) (discussing varying interpretations of phrases).

103. *See, e.g.*, Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2467 (1998) (questioning whether federal courts must disregard lower federal court precedent).

104. *See, e.g.*, *id.* (stating possible constitutional issue with § 2254(d) if Congress impermissibly interfered with exercise of Article III powers).

105. For a thorough recap of circuit courts' differing approaches prior to the Supreme Court's input on the statute's language, see 2 HERTZ & LIEBMAN, *supra* note 24, § 32.3.

106. 529 U.S. 362, 402-13 (2000).

107. Justice Stevens announced the Court's judgment, which was in favor of the petitioner, and his opinion was joined in its entirety by Justices Souter, Ginsburg, and Breyer; nevertheless, Justice O'Connor commanded the majority during her statutory interpretation of § 2254(d)(1), being joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia. *See Williams*, 529 U.S. at 365, 367, 399 (indicating majorities and concurrences). Thus, Justice O'Connor's analysis governs the construction of § 2254(d)(1) (except for one footnote with which Justice Scalia disagreed). *Id.* at 399, 402-13.

108. *Id.* at 367, 372-73.

109. 466 U.S. 668, 686 (1984).

Williams Court indicated, the district court ruled in favor of the petitioner, finding that the state supreme court's application of *Strickland*, which read *Lockhart v. Fretwell*[110] as altering *Strickland*'s test for prejudice, "'was contrary to, or involved an unreasonable application of, clearly established Federal law [i.e., *Strickland*]'" under § 2254.[111] The appellate court interpreted § 2254(d)(1) differently, specifically stating that relief cannot be granted unless the application of the precedent was unreasonable based on what "'reasonable jurists'" would deem to be such.[112] In granting certiorari, the Supreme Court reversed the appellate court's construction of § 2254(d)(1)[113] and, in doing so, laid the groundwork by which federal courts must apply the provision.[114]

In shaping the interpretation of § 2254(d)(1), Justice O'Connor unraveled the provision into its component parts. Initially, for the § 2254(d)(1) standard to apply, the claim must have been "adjudicated on the merits" by the state court.[115] Although Justice O'Connor did not dwell on this language in *Williams*, the Supreme Court has given meaning to the phrase "adjudicated on the merits" as requiring that the state court actually confront and decide the issue at hand, rather than rely on a procedural bar to preclude review.[116] In addition, federal courts have determined that if the state court did not decide fully any federal issue, due to faulty analysis or absence of such claims before the court, a federal habeas court is not bound by § 2254(d)'s requirements.[117] If the state has not adjudicated the claim on its merits, the federal habeas court reviews the claim de novo.[118]

Assuming the claim was adjudicated on its merits, the statute disallows federal habeas relief *unless* a state court's decision "was either (1) '*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) '*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States.'"[119] First, according to Justice O'Connor, the term "contrary," in light of

110. 506 U.S. 364 (1993).

111. *Williams*, 529 U.S. at 373-74 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

112. *Id.* at 374 (quoting Williams v. Taylor, 163 F.3d 860, 865 (4th Cir. 1998)).

113. *Id.* at 390-99 (reviewing lower courts' analyses and finding for petitioner).

114. *Id.* at 402-13.

115. For an in-depth breakdown of this phrase, see Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 230-35 (2002). See *supra* note 100 and accompanying text for language of § 2254(d)(1) requiring "on the merits" adjudication.

116. *See, e.g.*, Medellín v. Dretke, 544 U.S. 660, 679-80 (2005) (stating that § 2254(d) does not apply because Texas court's disposition relied on procedural default rule, which is not adjudication on merits of federal issue).

117. *See, e.g.*, Reagan v. Norris, 365 F.3d 616, 621 (8th Cir. 2004) (stating that because claim was not brought before state courts, there was no adjudication on merits and thus § 2254(d) was inapplicable); Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001) (stating because state courts did not address federal claim at all, federal court need not apply § 2254(d) and could review claim de novo).

118. *See, e.g.*, Rompilla v. Beard, 125 S. Ct. 2456, 2468 (2005) (reviewing claim de novo because state courts failed to reach federal issue). For a comprehensive discussion of "on the merits" case law, see 2 HERTZ & LIEBMAN, *supra* note 24, § 32.2.

119. *Williams*, 529 U.S. at 404-05 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

its natural dictionary meaning of "'diametrically different,'"[120] "suggests that the state court's decision must be substantially different from the relevant" Supreme Court precedent.[121] Not only will a state court decision be "contrary" if it is directly contradictory to a Supreme Court holding, but it will also fall victim to § 2254(d)(1)'s bar if it reaches a result that differs from the Court's precedent in a case with "facts that are materially indistinguishable."[122]

Next, Justice O'Connor turned to the meaning of "unreasonable application." Although she acknowledged the inherent difficulty in defining the term "unreasonable," Justice O'Connor stressed that "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[123] Elaborating, to determine if a state court's decision "involved an unreasonable application of . . . clearly established Federal law,"[124] a federal court "should ask whether the state court's application . . . was *objectively* unreasonable."[125] By rejecting a federal court's subjective view of the correctness of the state court application, a federal habeas court may grant relief under this prong only "if the state court identifies the correct governing legal principle from [a Supreme Court decision] but unreasonably applies that principle to the facts of the prisoner's case."[126]

Finally, "clearly established Federal law, as determined by the Supreme Court of the United States"[127] means holdings of the Court, not dicta, in effect during the contested state court decision.[128] Therefore, "[t]he threshold question . . . is whether [the petitioner] seeks to apply a rule of law that was clearly established *at the time* his state-court conviction became final."[129] Ultimately, the *Williams* Court applied the clearly established law of *Strickland* to find a constitutional violation.[130] The line of cases following *Williams* has reinforced the interpretive principles enunciated by the Court and given direction to federal

120. *Id.* at 405 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (Philip Babcock Gove ed., 1981)). In addition, Justice O'Connor noted the dictionary definitions of "'opposite in character or nature'" and "'mutually opposed.'" *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 495).

121. *Id.*

122. *Id.* at 405-06.

123. *Williams*, 529 U.S. at 410.

124. 28 U.S.C. § 2254(d)(1) (2000).

125. *Williams*, 529 U.S. at 409 (emphasis added).

126. *Id.* at 413. For a listing of circumstances in which the Court has deemed, or has refused to find, state court application of federal law unreasonable, see 2 HERTZ & LIEBMAN, *supra* note 24, § 32.3, at 1601-03.

127. 28 U.S.C. § 2254(d)(1) (2000).

128. *Williams*, 529 U.S. at 412.

129. *Id.* at 390 (emphasis added). Justice Stevens made this statement in the majority opinion. *Id.* As some commentators note, this interpretation is narrower than *Teague v. Lane*, 489 U.S. 288 (1989), based on the notion that federal courts hearing habeas petitions may only review rules in effect during the state court decision, and the rules must come from the Supreme Court, not lower federal courts. 2 HERTZ & LIEBMAN, *supra* note 24, § 32.3, at 1580-86.

130. *Williams*, 529 U.S. at 391-99.

courts regarding how to proceed with a § 2254(d)(1) analysis.[131]

D. Harmless Error Review After § 2254(d)(1)

Despite the Supreme Court's treatment of § 2254(d)(1) in *Williams* and its progeny, lower federal courts continued to struggle with AEDPA's silence concerning harmless error analysis.[132] When a federal habeas court focuses its attention on reviewing a constitutional error at the trial level for harmlessness, the conflict between *Brecht* and § 2254(d)(1) becomes immediately apparent.[133] As noted above, *Brecht* requires a federal habeas court to review a state court's *Chapman* analysis by asking whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'"[134] When a federal court attempts this obligation, however, it is confronted with § 2254(d)(1), which requires it to review a state court decision for whether it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[135] Andrea G. Hirsch

131. Randy Hertz and James Liebman conclude that the general analytical outline created by the Supreme Court involves first assessing the merits of the constitutional violation and then, should a violation exist, applying § 2254(d)(1) as interpreted by *Williams*. 2 HERTZ & LIEBMAN, *supra* note 24, § 32.3, at 1613-26. Nevertheless, Hertz and Liebman note the different approach taken in *Lockyer v. Andrade*, 538 U.S. 63 (2003). 2 HERTZ & LIEBMAN, *supra* note 24, § 32.3, at 1618-25. In *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Penry v. Johnson*, 532 U.S. 782 (2001), the Court, prior to actually applying § 2254(d)(1), first reviewed the substance of the petitioners' claims and concluded that there was a constitutional violation. 2 HERTZ & LIEBMAN, *supra* note 24, § 32.3, at 1615-17. Hertz and Liebman state that beginning with the merits of the claim makes certain that federal courts maintain their responsibility to independently review the claim, avoiding an unconstitutional power-stripping application of the provision. *Id.* at 1626.

132. *See, e.g.*, Hernandez v. Johnson, 248 F.3d 344, 379 (5th Cir. 2001) (discussing disagreement among federal courts as to whether *Brecht* should apply in harmless error analysis); Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000) (expressing uncertainty over whether *Brecht* harmless error analysis ought to be applied in light of AEDPA). It should be noted that Congress is currently considering a bill known as the Streamlined Procedures Act of 2005 ("SPA"), which does address to a certain extent a federal habeas court's role in harmless error by amending certain portions of AEDPA. H.R. 3035, 109th Cong. §§ 4, 6 (2005); S. 1088, 109th Cong. §§ 4, 6 (2005). The SPA, however, has been harshly criticized for its drastic cutbacks on federal habeas review, including its provisions which severely undermine a federal court's ability to review for harmless error. *See, e.g.*, *Terrorism Death Penalty Enhancement Act of 2005, and the Streamlined Procedures Act of 2005: Hearing on H.R. 3060 and H.R. 3035 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 106-09 (2005) (statement of Bernard E. Harcourt, Professor of Law, University of Chicago) (stating that SPA would preclude federal review of constitutional errors involving sentencing, including ineffective counsel claims).

133. In *Hernandez v. Johnson*, 248 F.3d 344, 379 (5th Cir. 2001), the court elaborated on this conflict. Although it ultimately decided the error was "structural," see *supra* note 55 discussing *Fulminante*, and thus avoided weighing in on the issue directly, the court did allude to its belief that *Brecht* survived the passage of AEDPA, *Hernandez*, 248 F.3d at 379.

134. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). See *supra* notes 70-85 and accompanying text for a discussion of the *Brecht* standard. For a discussion regarding *Brecht*'s application in the absence of a *Chapman* analysis on direct review, see *supra* notes 86-89 and accompanying text.

135. 28 U.S.C. § 2254(d)(1) (2000). See *supra* notes 98-131 and accompanying text for a discussion of the § 2254(d)(1) standard.

articulated the paradoxical nature of the conflict.[136] Difficulty arises when, as Hirsch describes, a federal court has determined that the state court's decision on direct review involving harmless error is "contrary to" or "an unreasonable application" of *Chapman*.[137] The federal habeas court is then confronted with the dilemma of whether to apply the clearly established federal law for direct review, that is *Chapman*, as *Williams* and its progeny seem to instruct, or whether to apply the standard that the Supreme Court has clearly directed a federal court to use on collateral habeas review—*Brecht*.[138]

Following is an overview of recent Supreme Court case law concerning post-AEDPA harmless error doctrine. Then the discussion turns to the circuit split that erupted among the federal courts pertaining to the issue of *Brecht*'s vitality in the face of § 2254(d)(1).

1. Supreme Court Jurisprudence Regarding Post-AEDPA Harmless Error

Until its recent decision in *Fry v. Pliler*,[139] the Supreme Court had not directly spoken to these two seemingly conflicting standards. Post-*Williams*, the Court had offered its most explicit guidance in *Penry v. Johnson*.[140] In *Penry*, dealing with a petitioner's claimed violation of his Fifth Amendment rights, the Court applied § 2254(d)(1) and determined that the state court's decision was not "contrary to" nor "an unreasonable application" of Supreme Court case law.[141] Interestingly, instead of moving to the petitioner's next claim, the Court alluded to the error as possibly qualifying as harmless.[142] It then proceeded to explicate its doubts that the petitioner could show that the constitutional error at trial level "'had substantial and injurious effect or influence in determining the jury's verdict,'" quoting this standard directly from *Brecht*.[143] After reviewing the other evidence presented at trial against the petitioner, the Court concluded that, because that evidence was sufficient without the piece that the petitioner contested violated his rights, he would in all likelihood fail to establish that the error was not harmless under the *Brecht* standard.[144]

Shortly after *Penry*, the Court issued a per curiam opinion that referred again to *Brecht*, without actually citing the case. In *Early v. Packer*,[145] the Court

136. Andrea G. Hirsch, *Harmless-Error Analysis in Habeas Corpus Cases: Should* Brecht *Still Apply?*, CHAMPION, Sept.-Oct. 2001, at 28, 30-31.

137. *Id.*

138. *Id.*

139. 127 S. Ct. 2321 (2007).

140. 532 U.S. 782 (2001).

141. *Penry*, 532 U.S. at 795.

142. *See id.* at 796 (doubting that admission of questionable report had "substantial and injurious" effect on verdict (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993))). It is important to note that the state court did not engage in a *Chapman* harmless error analysis. Penry v. State, 903 S.W.2d 715, 758-67 (Tex. Crim. App. 1995) (per curiam).

143. *Penry*, 532 U.S. at 795 (quoting *Brecht*, 507 U.S. at 637).

144. *Id.* at 795-96.

145. 537 U.S. 3 (2002) (per curiam).

reversed a federal appellate court for its application of § 2254(d)(1) to a state court decision, particularly criticizing the federal court's interpretation of "contrary to" as well as its failure to apply the "unreasonable application" requirement.[146] The lower federal court had also engaged in harmless error review, applying the *Brecht* standard.[147] The Court stated that the harmless error inquiry "*would have been proper* only if the [federal court] had first found (pursuant to the correct standard) that the [state] court's decision was 'contrary to' clearly established Supreme Court law."[148]

In *Mitchell v. Esparza*,[149] another per curiam decision, the Court reviewed a case in which the focal point was the state court's harmless error determination. The Court first determined that under § 2254(d)(1), the district court, in reviewing the petitioner's federal habeas claim, erred in holding that the state court's decision ran "contrary to" certain Supreme Court precedent.[150] The Court then inquired whether the state decision was an "'unreasonable application'" of federal law,[151] asking specifically if the state court complied with *Chapman*'s "reasonable doubt" standard.[152] Ultimately, it found that the state court's assessment of harmlessness was not an unreasonable application of the *Chapman* jurisprudence.[153]

In *Brown v. Payton*,[154] although the majority avoided any discussion of harmless error, Justice Souter in his dissent again alluded to the vitality of *Brecht*.[155] He ended his argument against the Court's finding that the state decision did not run afoul of the § 2254(d)(1) standard by stating "the effect of the [constitutional error] is surely substantial and injurious beyond any possible excuse as harmless error."[156] Additionally, in 2006, the Supreme Court issued an opinion, *Brown v. Sanders*,[157] which upheld as constitutional a situation in which the California Supreme Court invalidated two of four special circumstances found by the jury in a death penalty sentence.[158] In his dissent criticizing the

146. *Early*, 537 U.S. at 11.

147. Packer v. Hill, 291 F.3d 569, 579 (9th Cir. 2002).

148. *Early*, 537 U.S. at 10-11 (emphasis added).

149. 540 U.S. 12 (2003) (per curiam).

150. *Mitchell*, 540 U.S. at 17. The Court acknowledged that the precedent was "ambiguous" and thus the state court did not act "'contrary to'" its precedent. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2000)).

151. *Id.* at 17-19 (quoting 28 U.S.C. § 2254(d)(1)).

152. *Id.* at 17-18 (stating that "[a] constitutional error is harmless when 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"'" (quoting Neder v. United States, 527 U.S. 1, 15 (1999) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)))).

153. *Id.* at 19. Unlike *Penry*, the state court had engaged in a *Chapman* harmless error analysis. *See id.* at 14-15 (providing procedural background of case). The *Mitchell* Court ended its discussion by concluding that § 2254(d) required deferring to the state court decision. *Mitchell*, 540 U.S. at 19.

154. 125 S. Ct. 1432 (2005).

155. *Payton*, 125 S. Ct. at 1452 (Souter, J., dissenting).

156. *Id.* (citing Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)).

157. 126 S. Ct. 884 (2006).

158. *Sanders*, 126 S. Ct. at 894 (stating that there was no constitutional violation when jury

majority's handling of California's death penalty scheme, Justice Stevens stated that "if the question had been presented to us, I might well have concluded that the error here was harmless."[159] He then cited *Brecht*.[160]

In 2007, the Court issued an opinion that largely resolved any dispute over *Brecht*'s applicability post-AEDPA. In *Fry*, the Court confronted whether *Brecht* was the correct standard for federal habeas review if the state court neglected to perform a *Chapman* harmless error determination.[161] After the *Fry* petitioner was convicted, the California Court of Appeal found that there was no prejudice based on the trial court's exclusion of certain testimony but failed to express any harmless error standard.[162] Describing the proceedings on federal habeas review, the *Fry* Court pointed out that the Magistrate Judge concluded that "the state appellate court's failure to recognize error . . . [was] 'an unreasonable application of clearly established law as set forth by the Supreme Court'" but decided that the exclusion of testimony was not prejudicial under the *Brecht* standard.[163] The District Court accepted the Magistrate Judge's analysis and the Ninth Circuit affirmed the decision.[164]

Justice Scalia, writing for a unanimous Court,[165] found that "the Ninth Circuit was correct to apply the *Brecht* standard of review in assessing the prejudicial impact of federal constitutional error in a state-court criminal trial."[166] According to the Court, *Brecht* "did not turn on whether the state court itself conducted *Chapman* review" but rested on concerns such as state sovereignty and finality.[167] Reading into the language of the *Brecht* majority, concurring, and dissenting opinions, Justice Scalia stated that there was an assumption "that the *Kotteakos* standard would apply in virtually all § 2254 cases" and rejected the argument that certain wording in *Brecht* supported a restricted application, resorting again to "the other weighty reasons given in *Brecht* for applying a less onerous standard on collateral review."[168]

Although not necessarily encompassed in the confines of the Court's holding—that is, *Brecht*'s applicability regardless of a previous *Chapman* analysis—Justice Scalia also addressed whether § 2254(d)(1) discarded "the

considered invalid special circumstances and reversing Court of Appeals' grant of habeas).

159. *Id.* at 896 (Stevens, J., dissenting) (limiting issue only to whether California is "weighing" state).

160. *Id.*

161. Fry v. Pliler, 127 S. Ct. 2321, 2325 (2007).

162. *Id.* at 2324.

163. *Id.*

164. *Id.*

165. As the opinion's syllabus indicates, all of the Justices adopted Justice Scalia's opinion in Part II-A of the decision, except for the first footnote. *Id.* at 2323. In that portion of the opinion, Justice Scalia addressed *Brecht*'s applicability. *Fry*, 127 S. Ct. at 2325-27. The Justices were in disagreement, however, when it came time to apply *Brecht* to the facts of the case, issuing varying opinions as to whether the error was harmless under the *Brecht* standard. *Id.* at 2328-30 (Stevens, J., concurring in part and dissenting in part); *id.* at 2330-31 (Breyer, J., concurring in part and dissenting in part).

166. *Id.* at 2327.

167. *Id.* at 2325.

168. *Fry*, 127 S. Ct. at 2325-26.

requirement that a petitioner also satisfy *Brecht's* [sic] standard."[169] The Court, noting its "frequent recognition that AEDPA limited rather than expanded the availability of habeas relief," stated that "it is implausible that . . . AEDPA replaced the *Brecht* standard . . . with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable."[170] The Court stopped short, however, of setting forth how a federal court should approach harmless error analysis on habeas review.

2. Federal Circuit Split over *Brecht*'s Vitality

In sum, despite confirming that *Brecht* is the applicable harmless error standard in federal habeas cases post-AEDPA,[171] the Court has not explained how § 2254(d)(1) and *Brecht* work together. Thus, the obligation for a federal court torn between applying both *Brecht* and § 2254(d)(1) is not clear.[172] As a result, a circuit split emerged in which federal courts have formulated various approaches to manage the conflict.

Prior to *Fry v. Pliler*, two circuits expressed serious concern that *Brecht* was subsumed by AEDPA and explicitly rejected its application in specific instances.[173] In *Gutierrez v. McGinnis*,[174] the Second Circuit was forced to settle whether *Brecht* should be applied by a federal habeas court in light of § 2254(d)(1).[175] The court decided that "when a state court explicitly conducts harmless error review of a constitutional error, a habeas court must evaluate whether the state unreasonably applied *Chapman*," and under those circumstances, *Brecht* should no longer be applied.[176] It reserved the question of whether *Brecht* is applicable if the state court did not engage in a *Chapman* review.[177] In noting the split among the circuits,[178] the Second Circuit determined that *Mitchell*[179] "implicitly rejected *Brecht* . . . at least where the state explicitly

169. *Id.* at 2326.

170. *Id.* at 2327.

171. *See id.* at 2327 (finding *Brecht* to be correct test on habeas review even if state court did not apply *Chapman*).

172. Several commentators have taken on the issue, yet have come out on different ends. *Compare, e.g.*, Hirsch, *supra* note 136, at 31 (concluding that *Brecht* was "largely vitiated" by AEDPA and thus replaced by *Chapman*), *with, e.g.*, Mark R. Barr, Survey, *The Not-So-Great Writ: An Analysis of Recent Tenth Circuit Decisions Reflecting the Current Difficulty in Obtaining Habeas Corpus Relief for State Prisoners*, 80 DENV. U. L. REV. 497, 508 (2003) (stating that, despite split among circuits, *Brecht*'s "continuing vitality" is barely questionable).

173. Gutierrez v. McGinnis, 389 F.3d 300, 306-07 (2d Cir. 2004); Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000).

174. 389 F.3d 300 (2d Cir. 2004).

175. *Gutierrez*, 389 F.3d at 303.

176. *Id.* at 306.

177. *Id.* (stating that those facts were not before court). See *supra* notes 86 and accompanying text for a discussion of circuit treatment of *Brecht* in the absence of state court *Chapman* analysis.

178. *Gutierrez*, 389 F.3d at 304 n.3.

179. See *supra* notes 149-53 and accompanying text for a discussion of *Mitchell*.

adjudicated a federal claim on harmless error grounds."[180] The Eighth Circuit seemingly sided with the Second Circuit, voicing its doubts as to whether *Brecht* should be applied when a state court has undergone a *Chapman* analysis.[181]

The Second and Eighth Circuits, though, were the minority view. *Fry v. Pliler* now instructs that *Brecht* is indeed the correct harmless error standard for a federal court to apply in all habeas cases.[182] Even before *Fry*'s directive, most of the federal circuits were in agreement that *Brecht* endured the passage of AEDPA. Still, federal courts in the majority are split amongst themselves in regard to how the standard works in conjunction with § 2254(d)(1).

Both the First and Sixth Circuits have held that *Brecht* was not affected by AEDPA.[183] The First Circuit, in *Sanna v. DiPaolo*,[184] affirmed *Brecht*'s existence alongside § 2254(d)(1).[185] In noting the discord among circuits, the court acknowledged that it "consistently employed *Brecht* in cases arising under the AEDPA."[186] Similarly, in *Bulls v. Jones*,[187] the Sixth Circuit stated "if a habeas petitioner satisfies the *Brecht* standard, 'he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . resulted from an unreasonable application of *Chapman*.'"[188]

The Third Circuit, having not yet committed to a side, has nevertheless indicated a preference for the Sixth Circuit's resolution.[189] In *Marshall v. Hendricks*,[190] while not required to decide the issue, the Third Circuit implied in dicta that *Penry*'s discussion of *Brecht* was aligned with the Third Circuit's view prior to AEDPA—that *Brecht* "would apply . . . regardless of whether the state court applied the *Chapman* standard."[191] Additionally, the Third Circuit has described the *Brecht* standard as "more generous" than AEDPA,[192] leading the Ninth Circuit to surmise that the Third would ally with the Sixth.[193]

180. *Gutierrez*, 389 F.3d at 306 (interpreting *Mitchell* as prescribing application of § 2254(d)(1) only when state court has undergone independent *Chapman* harmless error analysis).

181. Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000). The Eighth Circuit rested its reasoning on the notion "that § 2254(d) . . . is unambiguous as to the scope of federal court review, limiting such review . . . in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations." *Id.*

182. *See* Fry v. Pliler, 127 S. Ct. 2321, 2328 (2007) (holding *Brecht* to be harmless error standard regardless of whether state court previously applied *Chapman*).

183. Bulls v. Jones, 274 F.3d 329, 335 (6th Cir. 2001); Sanna v. DiPaolo, 265 F.3d 1, 14 (1st Cir. 2001).

184. 265 F.3d 1 (1st Cir. 2001).

185. *Sanna*, 265 F.3d at 14.

186. *Id.*

187. 274 F.3d 329 (6th Cir. 2001).

188. *Bulls*, 274 F.3d at 335 (quoting Nevers v. Killinger, 169 F.3d 352, 371-72 (6th Cir. 1999)).

189. *See* Inthavong v. Lamarque, 420 F.3d 1055, 1060 (9th Cir. 2005) (stating that Third Circuit seems to align itself with Sixth Circuit).

190. 307 F.3d 36 (3d Cir. 2002).

191. *Marshall*, 307 F.3d at 73 n.25. See *supra* notes 86-89 and accompanying text for a discussion of *Brecht*'s applicability in the absence of state court *Chapman* analysis.

192. Lam v. Kelchner, 304 F.3d 256, 270 n.14 (3d Cir. 2002).

193. *Inthavong*, 420 F.3d at 1060 (rejecting Sixth Circuit's view, which is possibly supported by

The Fourth, Seventh, Ninth, and Tenth Circuits each apply a two-step inquiry that utilizes *Brecht*.[194] As articulated by the Ninth Circuit, in order to grant federal habeas relief, a court must find both: "(1) that the state court's decision was 'contrary to' or an 'unreasonable application' of Supreme Court harmless error precedent, and (2) that the petitioner suffered prejudice under *Brecht* from the constitutional error."[195] In other words, habeas courts adhering to this approach will conduct a § 2254(d)(1) analysis and will also subject the error to *Brecht* to test for harmlessness, both of which must point to granting relief. There is no specified order in which the two steps should be applied, yet "the nature of the parties' arguments and the interest in avoiding unnecessary constitutional decisions" should be taken into account.[196] It seems the trend, however, to subject the claim first to § 2254(d)(1) prior to inquiring into whether the error was harmless.[197] The rationale underlying this test derives from both subsections (a)[198] and (d)[199] of § 2254.[200] Assuming the petitioner's habeas claim falls into one of the allowances for relief under § 2254(d)(1) (i.e., "contrary to" or "unreasonable application"), so the reasoning goes, the petitioner must still meet § 2254(a) in order to receive a grant of his writ.[201] Thus *Brecht* is implicated during this stage of the analysis.[202]

It is difficult to place the Fifth and Eleventh Circuits in the mix. The Fifth Circuit has noted *Brecht*'s vitality yet has reserved its decision on the issue if the state court actually performed the *Chapman* review.[203] The Fifth Circuit has stated that "[i]n this circuit—at least when the state court did not perform its own harmless-error review—we simply apply the *Brecht* harmless-error analysis."[204] It refused to adopt the Second Circuit's approach under *Mitchell* and simultaneously did not reject the two-step approach followed by other

Third Circuit, that AEDPA standard "is wholly subsumed by the *Brecht* test").

194. Bland v. Sirmons, 459 F.3d 999, 1009 (10th Cir. 2006); *Inthavong*, 420 F.3d at 1059; Jones v. Polk, 401 F.3d 257, 264-65 (4th Cir. 2005); Aleman v. Sternes, 320 F.3d 687, 690-91 (7th Cir. 2003).

195. *Inthavong*, 420 F.3d at 1059.

196. *Aleman*, 320 F.3d at 691.

197. *See, e.g.*, *Bland*, 459 F.3d at 1009 (laying out procedure of applying § 2254(d)(1) prior to analyzing under *Brecht*); *Inthavong*, 420 F.3d at 1061 (concluding that § 2254(d)(1) does not allow for habeas relief, thus not applying *Brecht*); *Jones*, 401 F.3d at 264-65 (finding state court "unreasonably applied *Chapman*," moving then to its application of *Brecht*).

198. Section 2254(a) states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (2000).

199. For the wording of 28 U.S.C. § 2254(d)(1), see *supra* note 100 and accompanying text.

200. *Aleman*, 320 F.3d at 690.

201. *Id.*

202. *Id.* (stating that to determine if custody was caused by any error, *Brecht* must be applied).

203. Garcia v. Quarterman, 454 F.3d 441, 446-47 & n.10 (5th Cir. 2006).

204. *Id.* at 447.

circuits.[205] Similarly, the Eleventh Circuit is also problematic in classification. In *Ventura v. Attorney General*,[206] the Eleventh Circuit mentioned in passing that regardless of whether a state court has conducted a proper harmless error analysis, *Brecht* still governs a federal habeas court's review.[207] The court cited to Seventh and Tenth Circuit authority,[208] both of which apply the two-step test, but did not expressly confirm whether it endorses such an approach.

III. DISCUSSION

Although some federal courts did seriously question the survival of *Brecht v. Abrahamson*[209] post-AEDPA, most circuits contended that it was still the role of a federal habeas court undergoing harmless error review to determine whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'"[210] Nevertheless, circuits within the majority view diverge on the means by which to achieve such ends, and the Supreme Court has yet to issue definitive instruction on how a court must apply § 2254(d)(1) and *Brecht* together.[211] As this Comment now argues, *Brecht* is intact after AEDPA based on recent Supreme Court precedent, and the two-step approach employed by the Fourth, Seventh, Ninth, and Tenth Circuits is best suited to integrate efficiently both the § 2254(d)(1) standard and *Brecht*. The rationale behind the *Brecht* decision and AEDPA are aligned—thus *Brecht* does not clash with AEDPA but rather complements it.

This discussion first outlines the latest Supreme Court support for the *Brecht* standard's survival post-AEDPA. Then the analysis lays out the two-step approach that federal courts should use, specifically advocating the Seventh Circuit's rationale. Finally, the policies behind both AEDPA and *Brecht* are parallel, and the two-step approach is shown to exemplify such policies.

A. The Supreme Court Has Indicated Brecht*'s Vitality*

The following section begins with an analysis of Supreme Court cases that explicitly acknowledge *Brecht*.[212] Initially, the implications of *Fry v. Pliler*[213] are explored. Next, recent Supreme Court precedent is shown to support *Fry*'s outcome. Then *Mitchell v. Esparza*[214] is discussed, a case that seemingly created a wrinkle in the former line of cases. This section concludes with the assertion

205. *Id.* at 447 n.10.

206. 419 F.3d 1269 (11th Cir. 2005).

207. *Ventura*, 419 F.3d at 1279 n.4.

208. *Id.* (citing Aleman v. Sternes, 320 F.3d 687 (7th Cir. 2003); Herrera v. Lemaster, 301 F.3d 1192 (10th Cir. 2002)).

209. 507 U.S. 619 (1993).

210. *Brecht*, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

211. See *supra* Part II.D.2 and accompanying text for a discussion of circuit views on how *Brecht* should be applied.

212. See *supra* Part II.D.1 for a discussion of case law supporting *Brecht*.

213. 127 S. Ct. 2321 (2007).

214. 540 U.S. 12 (2003) (per curiam).

that *Mitchell* is, in fact, congruent with the notion that *Brecht* has not been vitiated and supports a two-step test, which is discussed in the next section.[215]

1. *Penry*, *Early*, *Payton*, and *Sanders* Support the *Fry* Decision

In *Fry v. Pliler*, the Supreme Court found that the *Brecht* harmless error standard applies on federal habeas review, irrespective of whether the state court performed a *Chapman v. California*[216] review, and expressly extended *Brecht* beyond the facts of that case.[217] Not only is it inferable from such a holding that AEDPA did not vitiate *Brecht*, but the Court also addressed this concern.[218] Justice Scalia stated in dicta that AEDPA did not "eliminate[] the requirement that a petitioner also satisfy *Brecht*'s standard" since the statute "sets forth a precondition to the grant of habeas relief ('a writ of habeas corpus . . . shall not be granted' unless the conditions of § 2254(d) are met), not an entitlement to it."[219] Accordingly, "it is implausible that, without saying so, AEDPA replaced the *Brecht* standard."[220]

The holding in *Fry* was the natural step in the Court's modern habeas jurisprudence, supported by the case law leading up to it. Since AEDPA's passage, but before *Fry*, the Supreme Court in *Penry v. Johnson*[221] "clearly indicated that a federal habeas court is to apply the *Brecht* standard to a habeas petition."[222] In *Penry*, a post-AEDPA case, after deciding that the state court's decision was "not contrary to" nor "an unreasonable application of" Supreme Court precedent under § 2254(d)(1), Justice O'Connor stated that even if one of § 2254(d)'s exceptions signified granting habeas relief,[223] the Court would still be obligated to determine if that constitutional error was harmless.[224] Had Justice O'Connor stopped at that point, there would have been considerably less guidance on *Brecht*. Nevertheless, the majority continued: "[T]hat error would justify overturning [the petitioner]'s sentence only if [the petitioner] could establish that the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[225] The Court then cited *Brecht*.[226] The Court

215. See *infra* Part III.A.2 for a demonstration of how *Mitchell* fits with other cases supporting *Brecht*.

216. 386 U.S. 18 (1967).

217. *Fry*, 127 S. Ct. at 2325-27 (stating "*Brecht* clearly assumed that the *Kotteakos* standard would apply in virtually all § 2254 cases" and that "the Ninth Circuit was correct to apply the *Brecht* standard").

218. *See id.* at 2326-27 (confronting whether AEDPA changed standard of review).

219. *Id.* (quoting 28 U.S.C. § 2254(d) (2000)).

220. *Id.* at 2327.

221. 532 U.S. 782 (2001). For a discussion of *Penry*, see *supra* notes 140-44 and accompanying text.

222. Herrera v. Lemaster, 301 F.3d 1192, 1199 (10th Cir. 2002) (finding *Brecht* to apply post-AEDPA).

223. See *supra* notes 119-26 and accompanying text for a discussion of the (1) "contrary to" and (2) "unreasonable application of" criteria of § 2254(d)(1).

224. *Penry*, 532 U.S. at 795.

225. *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

referenced *Brecht* again after stating that it had "considerable doubt that the admission of [certain evidence], even if erroneous, had a 'substantial and injurious effect' on the verdict."[227] Although Chief Justice Rehnquist, Justice Scalia, and Justice Thomas filed a dissent, none of the Justices openly disapproved of the majority's *Brecht* analysis.[228]

Early v. Packer[229] further solidified *Brecht*'s continuing presence in habeas corpus law. The Court stated that the Ninth Circuit's *Brecht* harmless error analysis was unfounded where the court erroneously performed a § 2254(d)(1) analysis.[230] In particular, the Court found that the Ninth Circuit failed to engage in both a "contrary to" *and* "an unreasonable application"[231] analysis mandated by *Williams v. Taylor*.[232] Crucial to *Brecht*, however, the Court declared that had the Ninth Circuit correctly abided by *Williams* and § 2254(d)(1), and assuming that such analysis led the court to find the state decision "contrary to" or "an unreasonable application" of Supreme Court law, then the *Brecht* harmless error analysis "would have been proper."[233]

Finally, in passing, two dissenting Justices referred to the federal courts' role as still applying *Brecht* in harmless error review. In *Brown v. Payton*[234] and *Brown v. Sanders*,[235] Justices Souter and Stevens, respectively, specifically cited *Brecht* as the controlling standard for harmless error on habeas corpus review.[236] The majorities in those cases did not reach the harmless error issue, but the Justices' references to *Brecht* post-AEDPA were significant nevertheless.

Thus, after AEDPA and prior to *Fry*, the Court endorsed the federal circuits' majority view. In all likelihood, there would have been little question regarding the Supreme Court's view toward *Brecht* if not for *Mitchell v. Esparza*.[237] Yet on closer inspection of *Mitchell*, as Justice Scalia acknowledged

226. *Id.*

227. *Id.* at 796 (quoting *Brecht*, 507 U.S. at 637).

228. *See id.* at 804-10 (Thomas, J., dissenting) (dissenting on grounds other than Court's *Brecht* analysis).

229. 537 U.S. 3 (2002) (per curiam). For a discussion of *Early*, see *supra* notes 145-48 and accompanying text.

230. *Early*, 537 U.S. at 10-11 (discussing need to apply § 2254(d) prior to analyzing for harmless error).

231. *Id.*

232. 529 U.S. 362 (2000).

233. *Early*, 537 U.S. at 10-11. Although not expressly citing *Brecht*, the Court described the Ninth Circuit's harmless error analysis as "'whether the error had a substantial or injurious effect on the jury.'" *Id.* at 10 (quoting Packer v. Hill, 291 F.3d 569, 579 (9th Cir. 2002)).

234. 125 S. Ct. 1432 (2005).

235. 126 S. Ct. 884 (2006).

236. In *Payton*, Justice Souter stated that since the "death sentence is subject to this reasonable possibility of constitutional error, . . . the effect of the instruction failure is surely *substantial and injurious*, beyond any possible excuse as harmless error." 125 S. Ct. at 1452 (Souter, J., dissenting) (emphasis added) (citation omitted). In *Sanders*, Justice Stevens indicated that, since the question of harmlessness was not before the Court, he would refrain from deciding harmlessness under *Brecht*. 126 S. Ct. at 896 (Stevens, J., dissenting).

237. 540 U.S. 12 (2003) (per curiam). For a discussion of *Mitchell*, see *supra* notes 149-153 and

in *Fry*,[238] the case is reconcilable with *Penry*, *Early*, and the majority of circuits adhering to *Brecht* after AEDPA, and in fact supports application of a two-step test to integrate § 2254(d)(1) and *Brecht*.

2. The Solution to the *Mitchell* Wrinkle

In *Mitchell*, unlike in *Penry* or *Early*, the Court squarely confronted a state court's harmless error determination.[239] After finding that the state court's decision was not "'contrary to . . . clearly established Federal law,'"[240] the Court then held that the state's *Chapman* analysis on postconviction review was not objectively unreasonable under § 2254(d)(1).[241] Because § 2254(d)(1) did not signal granting habeas, the Court deferred to the state court's determination.[242] There was no mention of *Brecht* in the opinion. The Second Circuit in particular interpreted *Mitchell* as "implicitly reject[ing] *Brecht* as the proper lens for examining the harmlessness of constitutional errors on collateral review, at least where the state explicitly adjudicated a federal claim on harmless error grounds."[243] The *Fry* petitioner made a similar argument to the Supreme Court,[244] opening the door for the Court to express its position on the issue.

On initial review, *Mitchell* could indicate a clear departure from *Brecht* in the scenario in which the state appellate court has actually engaged in harmless error review.[245] Indeed, neither *Penry* nor *Early* were cases in which the state appellate court had previously applied *Chapman*, or any harmless error review for that matter. Therefore, as implied by the Second Circuit,[246] *Penry*, *Early*, and *Mitchell* could be read collectively as endorsing a *Brecht* analysis on top of § 2254(d)(1) *only if* the state court had not formerly adjudicated a federal claim for harmless error. Otherwise, *Mitchell* would seem to preclude *Brecht* from the analysis, thereby vitiating the standard in part and replacing it solely with a § 2254(d)(1) determination of *Chapman* if the state reviewed for harmless error.

accompanying text.

238. *See* Fry v. Pliler, 127 S. Ct. 2321, 2326-27 (2007) (stating that *Mitchell* did not signal departure from *Brecht*).

239. *Mitchell*, 540 U.S. at 17-19 (analyzing state court's *Chapman* application).

240. *Id.* at 17 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

241. *Id.* at 17-18 (referencing *Williams*'s interpretation that "unreasonable" is different issue than if state court was "incorrect" in applying law).

242. *Id.* at 19 (concluding that since state court did not unreasonably apply *Chapman*, habeas relief may not be granted).

243. Gutierrez v. McGinnis, 389 F.3d 300, 306 (2d Cir. 2004).

244. *See* Fry v. Pliler, 127 S. Ct. 2321, 2326-27 (2007) (reviewing petitioner's argument that AEDPA changed harmless error standard).

245. This position was taken by the Second Circuit. *Gutierrez*, 389 F.3d at 307 n.7. The Eighth Circuit also chimed in on this view. Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000).

246. The Second Circuit reserved the question of whether *Brecht* applies absent a previous *Chapman* analysis. *Gutierrez*, 389 F.3d at 306.

Although there was support for such a rule,[247] as *Fry* now instructs, this interpretation focuses on the wrong inquiry. Rather than distinguishing between situations where *Chapman* harmless error has been performed and those where it has not in order to determine *Brecht*'s applicability in light of § 2254(d)(1), the true question is whether § 2254(d)(1) actually displaces *Brecht*. In both *Penry* and *Early*, the Court confirmed that *Brecht* was applicable in the federal courts' harmless error review if § 2254(d)(1) led to the conclusion that the state court's decision was "contrary to" or "an unreasonable application" of "clearly established" Supreme Court precedent.[248] Most recently in *Fry*, the Court held that *Brecht* applies even when the state court did not undergo a *Chapman* analysis, stating that *Mitchell* stood only for the proposition that "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable."[249] As Justice Scalia expressed, *Mitchell* does not lead to the conclusion that § 2254 replaced *Brecht*, since the Court "had no reason to decide the point."[250]

Based on the Court's guidance, then, if a state court used *Chapman*, a federal court must apply § 2254(d)(1) to review the state court's *Chapman* analysis. This application is directly supported by *Mitchell*.[251] Granted, *Mitchell* never reached the *Brecht* analysis, but this failure to apply *Brecht* was not due to that standard's partial vitiation. Rather, because § 2254(d)(1) instructed the Court to defer to the state court's harmlessness decision, as it was not "contrary to" nor "an unreasonable application" of *Chapman*, there was no reason to independently analyze for harmlessness on federal habeas review.[252]

This reasoning has been expressed by lower federal courts, with the Seventh Circuit, in particular, providing useful rationale.[253] The Seventh Circuit rejected the premise that if § 2254(d)(1) renders a state decision "contrary to" or an "unreasonabl[e] application" of federal law, then the petitioner is *entitled* to relief.[254] Section 2254(d) only states that relief "'*shall not be granted . . . unless*'" the state decision was "'contrary to'" or "'an unreasonable application'" of

247. *See* Hirsch, *supra* note 136, at 31 (voicing that *Chapman* should govern in *all* post-AEDPA harmless error federal review). Andrea G. Hirsch takes the view that *Brecht* has been *completely* vitiated by AEDPA and proposes an application of *Chapman* both in cases where the state court reviewed for harmless error and those where the court did not. *Id.*

248. Early v. Packer, 537 U.S. 3, 10-11 (2002) (per curiam); Penry v Johnson, 532 U.S. 782, 795 (2000). See *supra* notes 140-48 and accompanying text for a discussion of *Penry* and *Early*.

249. *Fry*, 127 S. Ct. at 2326.

250. *Id.* at 2326-27.

251. Mitchell v. Esparza, 540 U.S. 12, 18 (2003). See *supra* notes 149-53 and accompanying text for a discussion of *Mitchell*.

252. *See Fry*, 127 S. Ct. at 2326-27 (stating *Mitchell* Court held that habeas relief may not be awarded if harmlessness was not unreasonable, thus it had no reason to determine whether AEDPA vitiated *Brecht*).

253. Aleman v. Sternes, 320 F.3d 687, 690-91 (7th Cir. 2003). Justice Scalia confirmed the Seventh Circuit's reasoning in *Fry*, in which he stated that AEDPA "sets forth a precondition to the grant of habeas relief . . . not an entitlement to it." 127 S. Ct. at 2327.

254. *Aleman*, 320 F.3d at 690 (describing relationship between § 2254(d) and § 2254(a)).

Supreme Court case law.[255] As implied by Judge Easterbrook, *shall not be granted unless* is not equivalent to *shall be granted*.[256] A petitioner who satisfies § 2254(d)'s requirements must nonetheless be subjected to independent federal review under § 2254(a),[257] whereby *Brecht* substantively controls on review for harmless error.[258]

Therefore, *Fry*, *Penry*, *Early*, and *Mitchell* together outline the following general instructions: a federal court must first review the state court's *Chapman* harmless error analysis under the strictures of § 2254(d)(1), as articulated by *Williams v. Taylor*.[259] Should § 2254(d)(1) lead the federal court to conclude that the state's decision was neither "contrary to" nor "an unreasonable application" of *Chapman*, the federal court must defer to the state determination. Should the state's decision be either "contrary to" or "an unreasonable application" of *Chapman*, however, the federal court meets a § 2254(d)(1) exception and will review the harmless error inquiry de novo under the traditional federal habeas requirement set forth by the Supreme Court in *Brecht*.

In large part, the two-step approach, as employed by the Fourth, Seventh, Ninth, and Tenth Circuits, which takes into account both § 2254(d)(1) and *Brecht* when reviewing for harmlessness on federal habeas, most closely reflects the instructions implicit in recent Supreme Court jurisprudence. As noted above, the Second Circuit has misread *Mitchell* in light of *Penry* and *Early* to favor an unwarranted restriction on *Brecht*.[260] Equally flawed, the Sixth Circuit has read § 2254(d)(1) as not affecting *Brecht* in the slightest,[261] which fails to account for *Mitchell* ignoring *Brecht* when the state court's decision was not "contrary to" nor "an unreasonable application" of *Chapman* under § 2254(d)(1).

255. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2000)). For the full statutory text of § 2254(d)(1), see *supra* note 100 and accompanying text.

256. *Id.* at 690.

257. For the full statutory text of § 2254(a), see *supra* note 198.

258. *See, e.g.*, Inthavong v. Lamarque, 420 F.3d 1055, 1059 (9th Cir. 2005) (stating that once § 2254(d) analysis reveals state decision is "contrary to Supreme Court precedent or objectively unreasonable," federal habeas court "revert[s] to the independent harmless error analysis that [the court] would apply had there been no state court holding"); Jones v. Polk, 401 F.3d 257, 265 (4th Cir. 2005) (stating that because state court decision unreasonably applied *Chapman*, federal habeas review is de novo, requiring use of *Brecht* standard); Saiz v. Burnett, 296 F.3d 1008, 1012-13 (10th Cir. 2002) (concluding that if state court decision is unreasonable application of *Chapman*, federal court reviews independently, which leads to using *Brecht* standard).

259. Indeed, in *Fry*, Justice Scalia stated that it was "assume[d] (without deciding) that the state appellate court's decision affirming the exclusion of . . . testimony was an unreasonable application of *Chambers v. Mississippi*." Fry v. Pliler, 127 S. Ct. 2321, 2325 n.1 (2007). This assumption supports the conclusion that a court must first undergo a § 2254(d)(1) analysis. See *supra* Part II.C.2 for a detailing of *Williams*'s instructions.

260. See *supra* notes 243, 245-46 and accompanying text for a discussion of the Second Circuit's position.

261. See *supra* notes 183-88 and accompanying text for a discussion of the Sixth and First Circuits' interpretations.

B. The Refined Two-Step Approach Should Be Adopted by Federal Courts

Although the two-step approach employed by several circuits is best suited to integrate § 2254(d)(1) and *Brecht*, the current test should be refined in order to comply with Supreme Court direction in *Early*, where the Court instructed that § 2254(d)(1) should be applied prior to analyzing harmlessness under *Brecht*.[262] There will also be circumstances where a federal court will not be required to apply the two-step approach on habeas harmless error review. The following discussion sets forth both the refined two-step test mandated by *Early* as well as those situations in which the test need not be implemented.

1. Refining the Current Two-Step Approach

Under the current two-step approach applied by lower federal courts, one step in the analysis involves § 2254(d)(1) application and the other step involves a *Brecht* determination, both of which must direct the court to grant habeas relief.[263] According to the circuits, though, the steps may be applied in any order, since both must sufficiently point to relief.[264] The Seventh Circuit noted that "[u]nless its jurisdiction is at stake, a court may take up issues in whatever sequence seems best" taking into account "the nature of the parties' arguments and the interest in avoiding unnecessary constitutional decisions."[265]

Early instructs otherwise, however, and thus the current two-step approach should be tightened in order to comply with the decision. In *Early*, the Court reprimanded the circuit court for engaging in independent harmless error review prior to properly applying § 2254(d)(1).[266] The Court made clear that *Brecht* "would have been proper *only if* the Ninth Circuit had *first* found . . . that the [state] court's decision was 'contrary to' clearly established Supreme Court law—which it did not and could not."[267] Although admittedly *Early* did not involve a state court's harmless error review, there is no direct Supreme Court authority to support treating harmless error differently than any other issue requiring § 2254(d)(1) determination. The potential for relief under § 2254(d)(1) is thereby an unambiguous prerequisite to a federal court engaging in independent harmless error review,[268] and federal courts should consciously analyze the harmless error claim initially under § 2254(d)(1). Therefore, only if § 2254(d)(1)

262. Early v. Packer, 537 U.S. 3, 10-11 (2002) (per curiam).

263. *See*, *e.g.*, Inthavong v. Lamarque, 420 F.3d 1055, 1059 (9th Cir. 2005) (finding that court must consider state decision in light of § 2254(d)(1) and also analyze harmless error under *Brecht* standard).

264. *See*, *e.g.*, *id.* at 1061 (stating that there is no obligation to apply steps in any order); Aleman v. Sternes, 320 F.3d 687, 691 (7th Cir. 2003) (stating that issues may be addressed however facts of case necessitate).

265. *Aleman*, 320 F.3d at 691.

266. *Early*, 537 U.S. at 10-11.

267. *Id.* (emphasis added).

268. As *Early* states: "[T]he Ninth Circuit evaded § 2254(d)'s *requirement* that decisions which are not 'contrary to' clearly established Supreme Court law can be subjected to habeas relief *only if* they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law . . . ." *Id.* at 11 (first and second emphases added).

points to relief should the court then review the claim under *Brecht*.

2. Circumstances Under Which the Refined Two-Step Approach Is Inapplicable

Not every case in which a federal habeas court reviews for harmless error will require the federal court to apply the two-step test. There will be situations in which the state court did not engage in harmless error review at all.[269] A federal court's obligation is fairly established in such a situation: § 2254(d)(1) does not apply if the federal claim has not been previously adjudicated "on the merits" by the state court.[270]

Federal courts are in general agreement that they are not obligated to follow § 2254(d)(1)'s "contrary to" or "unreasonable application" test if the state court failed to adjudicate the federal claim, leaving the court to review independently for potential habeas relief.[271] Specifically regarding federal habeas harmless error review, freeing a federal court of its obligation to apply § 2254(d) simply alleviates the court's role to apply the two-step test. As indicated by the Tenth Circuit, *Brecht*, not § 2254(d), governs if the state did not address harmless error on its merits because the federal court reviews de novo.[272]

C. The Rationale Behind AEDPA Is Parallel with Brecht

As stated by Chief Justice Rehnquist, the *Brecht* "harmless-error standard is better tailored to the *nature and purpose* of collateral review than the *Chapman* standard, and . . . promotes the considerations underlying our habeas jurisprudence."[273] The "nature and purpose" of federal habeas corpus has been steadily revealed over the past several decades, with the Supreme Court, in large part, leading the way.[274] Summarizing in *Brecht*, Chief Justice Rehnquist stressed the importance for federal habeas review to uphold "the State's interest in the finality of convictions that have survived direct review within the state court system."[275] The *Brecht* majority also rested the "less onerous"[276] habeas harmless

269. *See, e.g.*, Garcia v. Quarterman, 454 F.3d 441, 447 (5th Cir. 2006) (applying *Brecht* in case where state court, having found no error, did not review for harmlessness). In *Penry*, the state court had not addressed harmless error, yet the Court discussed *Brecht*'s applicability on federal habeas review. Penry v. Johnson, 532 U.S. 782, 795-96 (2001).

270. *See, e.g.*, Medellín v. Dretke, 125 S. Ct. 2088, 2099-100 (2005) (O'Connor, J., dissenting) (stating that if claim has not been adjudicated on merits, § 2254(d) is inapplicable). For discussion of "on the merits" under § 2254(d), see *supra* notes 115-18 and accompanying text.

271. See *supra* notes 117-18 and accompanying text for reference to case law indicating federal courts' agreement on this point.

272. *See* Bland v. Sirmons, 459 F.3d 999, 1010 (10th Cir. 2006) (stating that for claims not addressed on merits by state court, de novo is correct standard of review).

273. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (emphasis added). *Fry* bolsters this reasoning, as well, referring to *Brecht* and stating that its "concerns appl[y] with equal force whether or not the state court reaches the *Chapman* question." Fry v. Pliler, 127 S. Ct. 2321, 2325 (2007).

274. See *supra* notes 67-69 and accompanying text for a discussion of major Supreme Court restrictions on federal habeas review.

275. *Brecht*, 507 U.S. at 635; *accord* Teague v. Lane, 489 U.S. 288, 309 (1989) (observing that

error standard on comity and federalism: "'The States possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions . . . frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'"[277] Generously issuing the habeas writ also "encourages habeas petitioners to relitigate their claims on collateral review" and trivializes state court proceedings.[278]

Congress was driven by concerns similar to those Chief Justice Rehnquist articulated in *Brecht* when it passed AEDPA.[279] Based on the certain overhauls AEPDA statutorily imposed on federal habeas law,[280] the Act was motivated largely to remedy "'problems of unnecessary delay and abuse'" considered rampant in the federal habeas system.[281] AEDPA took a number of recommendations from the Powell Committee[282] into account. Among the Committee's concerns involving collateral review were the "lack of coordination between federal and state legal systems," "prisoners filing excessive, last minute motions for stays of execution," and "last-minute litigation where claims are meritless . . . lead[ing] to the abuse of judicial resources and justices."[283]

Because *Brecht*'s concern for finality, comity, and federalism comports with AEDPA's concern for "unnecessary delay and abuse," application of *Brecht* post-AEDPA is the natural complement to § 2254(d)(1) for federal habeas harmless error review.[284] Unlike the more stringent *Chapman* standard, *Brecht* ensures that federal courts will not "undermine[] the States' interest in finality" or "infringe[] upon their sovereignty over criminal matters,"[285] a principle that falls in place next to § 2254(d)(1)'s "new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners."[286] It would make little intuitive sense if, after applying § 2254(d)(1), a federal court would revert back to the less deferential *Chapman* standard, which would lead to a higher likelihood of granting the habeas writ.[287] Rather, *Brecht*'s application, assuming

finality is important concern, particularly in criminal context).

276. *Brecht*, 507 U.S. at 623.

277. *Id.* at 635 (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).

278. *Id.*

279. *See* 1 HERTZ & LIEBMAN, *supra* note 24, § 3.2, at 112-13 (discussing House of Representatives Conference Committee report on AEDPA's effects).

280. See *supra* Part II.C.1 for a brief outline of AEDPA's changes to habeas law.

281. 1 HERTZ & LIEBMAN, *supra* note 24, § 3.2, at 112 (quoting H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.)).

282. The Powell Committee was an ad hoc federal habeas committee formed by Chief Justice Rehnquist. LISA M. SEGHETTI & NATHAN JAMES, CRS REPORT FOR CONGRESS, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 3 (2006), *available at* http://www.opencrs.com/rpts/RL33259_20060201.pdf.

283. *Id.* (discussing Powell Committee report).

284. *See* Fry v. Pliler, 127 S. Ct. 2321, 2327 (2007) (asserting "AEDPA limited rather than expanded the availability of habeas relief" and thus it is nonsensical to resort to "the more liberal AEDPA/*Chapman* standard").

285. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

286. Williams v. Taylor, 529 U.S. 362, 399 (2000) (O'Connor, J., concurring).

287. *See Fry*, 127 S. Ct. at 2327 (stating *Chapman* standard on habeas would not comport with

§ 2254(d) warrants independent review, maintains the notions of federalism pursued both by the courts and Congress.

IV. CONCLUSION

After the passage of AEDPA,[288] federal courts sitting in habeas were confronted with the apparent conflict between *Brecht v. Abrahamson*[289] and § 2254(d)(1)[290] when reviewing for harmless error.[291] The clash between standards created a circuit split in which some federal courts preserved *Brecht* while others seriously questioned its vitality.[292]

The Supreme Court recently indicated in *Fry v. Pliler*[293] that *Brecht* is the governing harmless error standard on habeas review regardless[294] of whether a lower court applied *Chapman v. California*,[295] but the Court has not yet explained how both § 2254(d)(1) and *Brecht* operate together. Ultimately, the two-step test applied by several federal circuits, after certain refinement, successfully encompasses both § 2254(d)(1) and *Brecht* in accordance with the recent Supreme Court line of cases.[296] The refined two-step test not only complies with Supreme Court jurisprudence but also honors the rationale behind both AEDPA and *Brecht*: concerns for federalism, comity, and finality.

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AEDPA's restriction on habeas relief).

288. 28 U.S.C.A. §§ 2244, 2253-2255, 2261-2266 (West 2006).

289. 507 U.S. 619 (1993).

290. 28 U.S.C. § 2254(d)(1) (2000).

291. See *supra* Part II.A-C for an explanation of the harmless error doctrine, particularly *Brecht* harmless error in federal habeas corpus, and AEDPA's impact on federal habeas corpus.

292. See *supra* Part II.D.2 for an overview of the circuit split.

293. 127 S. Ct. 2321 (2007).

294. *Fry*, 127 S. Ct. at 2327.

295. 386 U.S. 18 (1967).

296. See *supra* Part III.B for an outline of the refined two-step test that federal courts should apply on habeas review for harmless error analysis.

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